Iron Workers Local Union 86 of the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the AFL–CIO *and* Office and Professional Employees International Union, Local 8, AFL–CIO. Case 19–CA–21533

August 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 21, 1992, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a reply brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Iron Workers Local Union 86 of the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The Respondent moved to strike the testimony of Christine Mrak, allegedly for violating the Rules of Professional Conduct and abuse of Board process. The General Counsel and the Charging Party opposed the motion. Thereafter, the Respondent filed a reply memorandum in support of its motion to strike, the Charging Party filed a motion to strike the reply memorandum, and the Respondent filed a response to the Charging Party's motion. We find no merit in the Respondent's motion to strike the testimony of Christine Mrak and we deny the motion.

[2] We affirm the judge's denial of the Respondent's motion to dismiss the complaint on the ground that it subsequently agreed to provide the information originally requested. There is no evidence that the Respondent supplied the information. In any event, belated compliance cannot retroactively cure an unlawful refusal to supply information. *Interstate Food Processing*, 283 NLRB 303, 306 (1987), citing *U.S. Gypsum Co.*, 200 NLRB 305, 308 (1972)

Patrick F. Dunham, Esq., for the General Counsel.
Hugh Hafer, Esq., of Seattle, Washington, for the Respondent.
Clifford Freed, Esq., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in Seattle, Washington, on September 4, 1991.

The complaint, based on a charge filed by Office and Professional Employees International Union, Local No. 8, AFL–CIO, CLC (the Union)[1] alleges that Iron Workers Local Union 86 of the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the AFL–CIO (Respondent), as an employer, has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to comply with requests for information made by the Union on May 21 and August 12, 1991.[2]

II. THE ALLEGED MISCONDUCT

A. *Evidence*

Respondent belongs to a multiemployer association for purposes of collective bargaining involving certain of its employees. The Union represents the employees of Respondent and the other association members in a unit described as:

> All office employees employed by the employer-members of the Association, excluding elected officers, elected or hired business representatives, staff assistants and organizers and supervisors as defined by the Act.[3]

These employees are covered by a labor agreement effective from April 1, 1989, through March 31, 1992.

On July 5, 1990, Respondent discharged unit employee Kathryn (Kathy) Whitaker. The Union grieved the action pursuant to the agreement, and the matter eventually went to arbitration.

The arbitrator, by decision dated April 18, 1991, concluded that the discharge was not supported by ''just cause'' indeed, that Respondent had discharged Whitaker ''in reprisal for filing grievances and [for] her husband's refusal to support [business manager] Mitchell in his election campaign''—and directed Respondent to reinstate her with backpay.

On May 7, 1991, Respondent's and the Union's respective attorneys, Lawrence Schwerin and Christine Mrak, met to discuss implementation of the arbitration award. Schwerin presented Mrak with a certain Report of Investigation, dated October 2, 1990, that Respondent recently had obtained from the U.S. Department of Labor, Office of Labor-Management Standards, which implicated Whitaker in the embezzlement of union funds. Mrak discounted the report as ''investigative'' only, and not ''determinative'' of anything.

Schwerin conceded that the U.S. Attorney had said he would not prosecute ''because the evidence was insufficient to sustain his burden of proof.'' Even so, Schwerin announced, Respondent planned to sue Whitaker civilly, ''where the standard of proof would be less stringent''; and

[1] The Union filed the charge on June 4, 1991. The complaint issued on July 1, and was amended during the trial.

[2] The pleadings establish and I find that Respondent is an employer engaged in and affecting commerce within Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization within Sec. 2(5).

[3] I find this unit to be appropriate for purposes of the Act.

had applied to its bonding company for reimbursement of the missing funds. Schwerin added that, because the bonding company knew about the Report of Investigation, it had terminated Whitaker's bond, rendering her ''unemployable'' by Respondent. Schwerin continued that he therefore would seek vacation of the arbitration award.

Schwerin then proposed this alternative: If Whitaker would ''relinquish'' her rights under the award, Respondent would forget the lawsuit, leave the award undisturbed, and withdraw its application to the bonding company.[4] Mrak said she would confer with Whitaker and ''get back to'' Schwerin.

Mrak ''got back to'' Schwerin by letter dated May 21. In it, she attacked the Report of Investigation, asserting not only that the U.S. Attorney had decided the evidence on which it relied was ''insufficient to prove the conclusions in the Report,'' but that it contained purported statements of fact Respondent knew to be ''false.'' The letter proclaimed that Respondent would be ''liable for malicious prosecution'' should it sue Whitaker, then concluded:

> Unless Local 86 is prepared to rescind its threats and comply with the arbitration award, OPEIU requires the following information to further represent its members:
>
> 1. An opportunity to review all originals, and to make copies of all records provided to OLMS or the U.S. Attorney.
> 2. The name, address and telephone number of Local 86's bonding company.
> 3. All contracts, memos, claims, applications, correspondence and other documents between Local 86 representatives or attorneys, and the bonding company.
> 4. A detailed calculation of the backpay and benefits which Local 86 believes is due Kathy under the terms of the arbitration award.
> 5. Your available hearing dates between now and June 14, 1991.
>
> Please provide the foregoing no later than May 31, 1991.

Schwerin responded by letter dated May 31. It stated, with regard to Mrak's request numbered 2:

> Local 86 bonding is governed by its International Constitution Article XXI, Section 20. The International has arranged for bonding for all its locals. The insurance broker is the MacLaughlin Company, 1725 DeSayo Street N.W., Washington, D.C. 20036 and the bonding company is Fidelity and Deposit Company of Maryland. I have been advised that the bonding insurance agreement contains a Section 10 reading: ''This bond shall be deemed cancelled as to any employee: (a) immediately upon discovery by the insured, or by a partner or officer thereof not in collusion with such employee of any fraudulent or dishonest act on the part of such employee whether in the service of the insured or otherwise. . . .'' Local 86, through the Department of Labor's investigation had discovered that Kathy Whitaker has engaged in a fraudulent or dishonest act and the bond is therefore cancelled as to her.

[4] The implication being that Whitaker's bondability thereby would be restored.

Schwerin's letter added:

> If Ms. Whitaker still desires reinstatement, federal law, 29 U.S.C. § 501, requires that she be bonded. Should Ms. Whitaker or Local 8 on her behalf establish her eligibility for bonding with a different bonding company, please advise us. Before accepting such a bond Local 86 will require that the bonding company be informed of the results of the Department of Labor investigation.

As concerns Mrak's request numbered 4, Schwerin's May 31 letter devoted two pages to detailed and sundry observations and questions ''for the purposes of narrowing the issues,'' but without positing definitive figures or calculations. The letter ignored requests numbered 1 and 3.[5]

Mrak rejoined by letter dated June 3, stating in part:

> On May 3, 1991,[6] I requested the name, address and telephone number of Local 86's bonding company, and a copy of all contracts, memos, claims, applications, correspondence and other documents between Local 86 representatives or attorneys, and the bonding company.
>
> In response you provided only the name and address of the broker and name of the bonding company.
>
> On May 3, 1991, I requested an opportunity to review all originals, and to make copies of all records provided to OLMS or the U.S. Attorney.
>
> You provided nothing in response.
>
> By refusing to provide me the above you have prevented me from effectively representing Ms. Whitaker regarding issues you have interjected to excuse Local 86's refusal to comply with the award. I will seek all available sanctions.

On July 2, the arbitrator's continuing jurisdiction having been secured, he convened a supplemental hearing to consider Whitaker's backpay entitlement. Schwerin moved that he instead vacate his award. Mrak countermoved that he limit the inquiry to the issue of backpay and not ''revisit'' the validity of the award. The arbitrator denied Schwerin's motion and granted Mrak's, then continued the matter to give Respondent more time to assemble backpay data.

By letter to Schwerin dated August 12, Mrak wrote:

> In relation to OPEIU's representation of Kathy Whitaker please provide me the Local 86 accountant reports since 1978.[7] In regard to the audit which prompted the OLMS investigation please also provide the accountant's working papers, and all communications between the accountant and Local 86, related thereto.
>
> There is no accountant-client privilege in Washington.

Attorney Hugh Hafer, an associate of Schwerin's, replied by letter dated August 15:

[5] The letter did not speak expressly to request numbered 5, either, but didsuggest that the parties secure the arbitrator's ''continuing jurisdiction'' to facilitate resolution of issues outstanding. The complaint does not allege a violation with respect to that request.

[6] Mrak presumably meant to say May 21—the date of her previous letter to Schwerin.

[7] Respondent hired Whitaker in 1978.

> This will acknowledge receipt of your letter dated August 12, 1991, addressed to Larry Schwerin. Since the arbitrator rejected evidence concerning the DOL audit and/or bondability of Whitaker, such matters are not presently pending in the grievance and arbitration proceeding. Accordingly, your request for information is denied.

Mrak answered Hafer with this, dated August 19:

> I received you [sic] letter of August 15, 1991, wherein you decline to produce the information I requested on August 12 because the issue to which it relates is ''not presently pending in the grievance and arbitration proceeding.'' While that is not the legal standard for an employer's obligation to produce information, I point out that Local 86 continues to insinuate the alleged embezzlement issue into the parties' discussion of this grievance.
>
> Mr. Schwerin has made it clear on many occasions that Local 86 will continue to refuse to comply with the arbitration decision, and will seek to vacate it, based upon the issue to which the information request relates. In addition, Mr. Schwerin has stated that any settlement of this grievance must include a deduction for the amount Local 86 alleges Whitaker embezzled.
>
> In order to evaluate Local 86's position, discuss potential settlement, and continue representing Whitaker to achieve a final resolution of this dispute we need to have the requested information.
>
> None of the above should be news to you. If Local 86 is prepared to drop the embezzlement claim, reinstate Whitaker and pay her the sums ordered by the arbitrator I will withdraw my request for information. If you are not prepared to do this, it is quite obvious that the issue to which the requested information relates is very much ''presently pending'' between the parties.

On August 24, Schwerin told Mrak that Respondent would not consider ''any resolution'' of Whitaker's backpay entitlement ''that did not include a deduction of'' the approximately $14,000 she supposedly had embezzled. Schwerin also revived the specter of a lawsuit and said he would appeal the arbitrator's denial of the motion to vacate.

After the abbreviated July 2 supplemental hearing, meanwhile, the arbitrator engaged Mrak and Schwerin in two ''teleconferences'' dealing with the backpay issue; and, on about August 26, the two attorneys submitted detailed briefs to the arbitrator—and to each other—setting forth their positions, figures, and calculations. Schwerin's asked the arbitrator to reconsider Respondent's motion to vacate, as well.

Beyond expressly denying Mrak's August 12 request for information, Respondent never complied with requests numbered 1 and 3 in her May 21 letter, and complied incompletely with that numbered 2. Unaided by Respondent, Mrak did locate and speak with an attorney for the bonding company, who told her Whitaker's ''bonding status would be unaffected unless [Respondent] sustained its burden to prove the allegations of embezzlement.''

The supplemental arbitration matter was ongoing at the time of the present trial.

B. *Conclusions*

The Board stated in *Doubarn Sheet Metal*, 246 NLRB 886, 888 (1979):

> [A]n employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by a bargaining representative for the proper performance of its duties. The obligation extends beyond contract negotiations to matters of contract administration, including the processing of grievances. An employer has no obligation to provide information which is plainly irrelevant to any dispute concerning the bargaining unit, but it must supply information which is of even probable or potential relevance.

See also *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–437 (1967); *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989); *United Technologies Corp.*, 274 NLRB 504, 506 (1985).

Regarding the standard by which relevance is to be measured, the Board stated in *Island Creek Coal Co.*, supra at 292 NLRB 487:[8]

> Where the information sought covers terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required . . . . It is not required that there be grievances or that the information be such as would clearly dispose of them. The Union is entitled to the information . . . . to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.

Respondent, by its post-award injection of the Report of Investigation, seeks to frustrate the award. The Union, by requests numbered 1, 2, and 3 in Mrak's May 21 letter and by the request in her August 12 letter, seeks information to assist it in evaluating and responding to the Report—that is, returning to the above extract from Island Creek Coal Co., to help it determine if ''further processing of the grievance or bargaining about the disputed matter'' (emphasis added) is warranted.

I find that the information identified in the preceding paragraph meets the applicable standard of relevance, and conclude that Respondent violated Section 8(a)(5) and (1) by failing to comply with requests numbered 1 and 3 in the May 21 letter, by complying incompletely with request numbered 2,[9] and by denying the August 12 request.[10]

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[8] Quoting from *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

[9] That the Union obtained some of the information by other means does not cure Respondent's failure. *Hollywood Film Co.*, 213 NLRB 584, 592 (1974).

[10] I hereby deny Respondent's motion, dated December 4, 1991, that I dismiss the complaint on the ground that, by letter dated November 7, it had ''agreed to provide the information originally requested.'' I have no evidence that production in fact has occurred; moreover, production so belated does not exonerate. E.g., *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

Request numbered 4 in Mrak's May 21 letter appears to call for argument or theory, as opposed to information. Beyond that, the weight of evidence indicates that the parties have been working meaningfully with the arbitrator in this area, and neither the General Counsel nor the Union argues in brief that Respondent breached its bargaining obligation in this particular. I conclude in all the circumstances that Respondent has not violated the Act as concerns request numbered 4.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act by failing to comply with requests numbered 1 and 3 in the Union's letter dated May 21, 1991; by complying incompletely with request numbered 2 in that letter; and by denying the request in the Union's letter dated August 12, 1991.

Respondent did not violate the Act as concerns request numbered 4 in the May 21 letter.

REMEDY

Having found that Respondent is violating Section 8(a)(5) and (1) by failing to comply with the Union's requests for certain information, I shall recommend that it cease and desist therefrom; and, affirmatively, to effectuate the policies of the Act, that it promptly supply said information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Iron Workers Local Union 86 of the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the AFL–CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Office and Professional Employees International Union, Local No. 8, AFL–CIO, CLC, by failing and refusing to comply with requests numbered 1 and 3 in its letter dated May 21, 1991; by complying incompletely with request numbered 2 in that letter; and by denying the request in its letter dated August 12, 1991.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take this affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish to Local No. 8 the information it requested by letters dated May 21 and August 12, 1991, which Respondent has unlawfully withheld.

(b) Post at its office in Seattle, Washington, copies of the attached notice, marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

I hereby dismiss that portion of the complaint I have found to be without merit.

[11] I hereby deny any outstanding motions inconsistent with this recommended Order. If no exceptions are filed as provided by Section l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Office and Professional Employees International Union, Local No. 8, AFL–CIO, CLC, by failing and refusing to comply with information requests numbered 1 and 3 in its letter dated May 21, 1991; by complying incompletely with request numbered 2 in that letter; and by denying the request in its letter dated August 12, 1991.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL promptly furnish to Local No. 8 the information it requested by letters dated May 21 and August 12, 1991, which we have unlawfully withheld.

IRON WORKERS LOCAL UNION 86 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFFILIATED WITH THE AFL–CIO